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IBRAHIM AMAT

v.

PP

B

COURT OF APPEAL, PUTRAJAYA
HASAN LAH JCA
ABDUL WAHAB PATAIL JCA
CLEMENT SKINNER JCA
[CRIMINAL APPEAL NO: D-05-81-09]

C

20 JULY 2011

CRIMINAL LAW: *Firearms (Increased Penalties) Act 1971 - Section 3 - Conviction and sentence - Appeal against - Discharging firearm with intent to cause death or hurt while committing scheduled offence - Possession of arms without license - Whether appellant had intention to cause death while resisting arrest - Whether irresistible inference from appellant's acts supports finding of guilt - Whether appreciation of evidence by trial judge flawed - Mat v. PP*

D

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CRIMINAL PROCEDURE: *Trial - Joint trial - Joinder of charges - Discretionary power of trial judge - Whether trial judge wrong in allowing joint trial - Whether offences closely connected to form same transaction - Criminal Procedure Code, s. 165(1)*

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The appellant was convicted and sentenced for the offences under ss. 3 and 8 Firearms (Increased Penalties) Act 1971 ('the Act') and s. 8(a) Arms Act 1960 respectively. The appellant had pleaded guilty to all the said charges except for the charge under s. 3 of the Act. The brief facts of the case herein are in relation to the arrest of the appellant and his co-accused. On receiving

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information about the appellant's presence, a police party led by ASP Mohamad Hatta ('SP6') found the appellant and his co-accused sitting in their car with its engine running. About 12 to 13 feet away from the appellant's car, SP6 had shouted the word "Police" three times through his front side window which was

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wound down in the direction of the appellant's car. At the same time, Det. L/Kpl Bakri ('SP8') who was in the same car as SP6, approached the appellant's car holding a gun. It was SP6's evidence that he saw the appellant pointing a revolver and fired a shot in the direction of SP8 but the shot had missed its mark.

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SP6 and his men then returned fire. The appellant came out of his car and threw a waist pouch which contained six bullets, onto

the ground. A homemade pistol, revolver, bullets and one spent shell were all found at the scene of incident. During trial, it was the prosecution's case that the appellant was resisting arrest when he discharged his firearms. On the other hand, the appellant submitted that before the shooting took place, the police did not identify themselves as policeman and they were all dressed in civilian clothes. According to the appellant, he thought the persons in the car were his enemies and during the chaos, he had pulled out his pistol but was not aware whether he fired the pistol or not. The trial judge found that the prosecution had proved its case. Hence, the appellant appealed against his conviction and sentence in relation to the charge under s. 3 of the Act as well as the sentences imposed on him in the other cases. The appellant contended that there was a wrongful misjoinder of charges whereby it was not permissible for the following offences, namely (a) joint possession of a homemade firearm (b) joint possession of a bullet in the homemade firearm and (c) possession of bullets found in the waist pouch thrown out from the car, to have been tried jointly tried with the following offences, namely (d) discharging a firearm in the course of committing a scheduled offence (e) possession of that firearm and (f) possession of the bullets in the said firearm. The appellant also contended that (i) no case had been made out against him under s. 3 of the Act and (ii) the appreciation of evidence by the trial judge was flawed.

Held (dismissing the appeal; affirming conviction and sentence)

Per Clement Skinner JCA delivering the judgment of the court:

(1) A reading of ss. 163, 164, 165, 166 and 170 of the Criminal Procedure Code shows that whilst there should be a separate trial for every distinct offence with which a person is charged, it is not a must. The court is given a discretion whether to allow a joint trial of more than one offence if the conditions mentioned in the aforementioned sections are met. (para 13)

(2) Immediately after the shoot-out between the police and the appellant, the homemade firearm with the bullet in it was found in the car driven by the appellant. Likewise, the waist pouch in which the bullets were found was thrown to the

A ground by the appellant on his coming out of the car to surrender to the police after the shoot-out. These acts and facts which constitute the other three charges did not just occur by themselves independent of each other and at different places and dates or times but were in fact part and
B parcel of the earlier act of the appellant. The series of acts were so closely connected together that they formed the same transaction. (para 13)

(3) Although the police did not get a chance to actually lay their
C hands on the appellant so as to arrest him before the shoot-out, this did not mean that the appellant was not resisting arrest when he discharged his firearm. Whether the appellant was resisting arrest when he fired the gun is a matter to be inferred from the conduct of the appellant in the prevailing
D circumstances at the material time. (para 13)

(4) Even though the bullet fired by the appellant was never produced in court, there was the eye witness account of SP6 and SP8 regarding the discharge by the appellant of the gun in SP8's direction. It had not been shown that SP6 and SP8
E were not credible witnesses or that their account of the events were not worthy of belief. The irresistible inference of such act was that the appellant intended thereby to cause death while resisting arrest. (para 13)

F **(5)** The error by the trial judge in failing to have correctly identified which witness asked the appellant to get out of the car was not a serious one as the evidence referred to by the learned judge did exist but he only got it wrong as to who asked the appellant to get out of his car. This was not a case
G where the learned judge had relied on non-existent evidence to come to a finding that the appellant refused to get out of the car and tried to resist the arrest. The learned judge may not have recited the text stated in the case of *Mat v. PP*, but it cannot be said that he did not consider the defence of the
H appellant and found that the prosecution had proved their case beyond a reasonable doubt. (para 13)

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Bahasa Malaysia *Translation Of Headnotes*

Perayu telah disabit dan dihukum bagi tuduhan-tuduhan di bawah ss. 3 dan 8 Akta Senjata Api (Penalti Lebih Berat) 1971 ('Akta tersebut') dan s. 8(a) Akta Senjata Api 1960 masing-masing. Perayu telah mengaku salah terhadap kesemua tuduhan tersebut kecuali tuduhan di bawah s. 3 Akta tersebut. Fakta ringkas kes di sini adalah berkaitan dengan penangkapan perayu dan rakan sepertuduhannya. Setelah mendapat maklumat mengenai kehadiran perayu, sepasukan polis yang diketuai oleh ASP Mohamad Hatta ('SP6') telah menjumpai perayu dan rakan sepertuduhannya duduk di dalam kereta mereka dengan enjinnya berjalan. Kira-kira 12 hingga 13 kaki dari kereta perayu, SP6 telah menjerit perkataan "Polis" tiga kali melalui tingkap hadapannya yang telah diturunkan terhadap arah kereta perayu. Pada masa yang sama, Det. L/Kpl Bakri ('SP8') yang berada di dalam kereta yang sama dengan SP6, telah menuju ke kereta perayu dengan memegang senapang. Adalah keterangan SP6 bahawa beliau telah melihat perayu menuju satu revolver dan melepaskan satu tembakan ke arah SP8 tetapi tembakan tersebut tidak kena pada sasarannya. SP6 dan orang-orangnnya telah kemudiannya membalas tembakan tersebut. Perayu keluar dari keretanya dan membuang satu kantung pinggang yang mengandungi enam peluru ke atas tanah. Satu pistol buatan rumah, revolver, peluru dan satu peluru terguna telah dijumpai di tempat kejadian. Semasa perbicaraan, adalah kes pendakwaan bahawa perayu telah menentang penangkapannya apabila dia melepaskan tembakan dengan senjata api. Sebaliknya, perayu telah berhujah bahawa sebelum tembakan berlaku, pihak polis tidak memperkenalkan diri mereka sebagai anggota polis dan mereka semua berpakaian seperti orang awam. Menurut perayu, dia menyangka bahawa orang-orang di dalam kereta adalah musuhnya dan semasa keadaan kucar-kacir, dia telah menarik keluar pistolnya tetapi tidak sedar sama ada dia telah melepaskan tembakan atau tidak. Hakim perbicaraan mendapati bahawa pihak pendakwaan telah membuktikan kesnya. Oleh itu, perayu merayu terhadap sabitan dan hukuman di bawah s. 3 Akta tersebut bersama-sama dengan hukuman yang disabit terhadapnya di dalam kes-kes yang lain. Perayu telah berhujah bahawa terdapat percantuman salah tuduhan di mana ianya tidak dibenarkan bagi kesalahan-kesalahan berikut, iaitu (a) pemilikan bersama senjata api buatan rumah (b) pemilikan bersama peluru di dalam senjata api buatan rumah (c)

A pemilikan peluru yang dijumpai di dalam kantung pinggang yang telah dibuang keluar dari kereta, untuk dibicara bersama kesalahan-kesalahan berikut, iaitu (d) melepaskan tembakan ketika melakukan kesalahan berjadual (e) pemilikan senjata api tersebut (f) pemilikan peluru-peluru di dalam senjata api tersebut. Perayu juga telah B berhujah bahawa tiada kes yang telah dibuktikan terhadapnya di bawah s. 3 Akta tersebut dan penghargaan keterangan-keterangan oleh hakim perbicaraan adalah cacat.

Diputuskan (menolak rayuan; sabitan dan hukuman C dikekalkan)
Oleh Clement Skinner HMR menyampaikan penghakiman mahkamah:

(1) Satu bacaan ss. 163, 164, 165, 166 dan 170 Kanun Tatacara Jenayah menunjukkan bahawa sementara perlunya satu D perbicaraan berasingan bagi setiap kesalahan yang berbeza di mana seseorang dituduh, ianya bukan satu kemestian. Mahkamah diberikan budi bicara sama ada untuk membenarkan perbicaraan bersama yang melebihi satu kesalahan jika syarat-syarat yang dinyatakan di dalam seksyen- E seksyen di atas dipatuhi.

(2) Sejurus selepas tembakan di antara polis dan perayu, senjata api buatan rumah dengan peluru di dalamnya telah dijumpai di dalam kereta yang dipandu oleh perayu. Begitu juga, kantung F pinggang di mana peluru-peluru dijumpai telah dibuang ke atas tanah oleh perayu apabila dia keluar dari kereta untuk menyerah diri kepada polis selepas tembakan. Kejadian-kejadian ini dan fakta-fakta yang menyebabkan tiga lagi kesalahan tidak muncul dengan sendiri bebas daripada satu sama lain dan pada G tempat-tempat, tarikh atau masa berlainan tetapi adalah sebahagian daripada kejadian awal perayu. Siri-siri perbuatan berhubung rapat bersama di mana mereka telah membentukkan transaksi yang sama.

H **(3)** Walau pun polis tidak mempunyai peluang untuk meletakkan tangan atas perayu bagi menangkapnya sebelum tembakan dilepaskan, ini tidak bermakna bahawa perayu tidak menentang tangkapan sebelum melepaskan tembakannya. Sama ada perayu menentang tangkapan apabila dia melepaskan tembakan adalah I perkara untuk disimpulkan daripada kelakuan perayu dalam keadaan semasa pada masa material.

(4) Meskipun peluru yang ditembak oleh perayu tidak dikemukakan di mahkamah, terdapat keterangan saksi ('eye witness') SP6 dan SP8 berkenaan pelepasan tembakan oleh perayu terhadap arah SP8. Ianya tidak ditunjukkan bahawa SP6 dan SP8 adalah saksi-saksi yang tidak boleh dipercayai atau pun kenyataan mereka mengenai peristiwa-peristiwa tidak boleh dipercayai. Inferens yang tidak dapat disangkal daripada kelakuan sebegitu adalah perayu mempunyai niat untuk menyebabkan kematian semasa menentang tangkapan.

(5) Kesilapan hakim perbicaraan dalam kegagalan untuk mengenalpasti saksi yang mana telah meminta perayu keluar daripada kereta bukanlah satu yang serius memandangkan keterangan yang dirujuk oleh yang arif hakim memang wujud tetapi beliau hanya salah terhadap siapa yang telah meminta perayu keluar dari keretanya. Ini bukan satu kes di mana yang arif hakim telah bergantung kepada keterangan yang tidak wujud untuk sampai kepada satu penemuan bahawa perayu enggan keluar dari kereta dan telah cuba menentang tangkapannya. Yang arif hakim mungkin tidak merujuk kepada teks yang dinyatakan dalam kes *Mat v. PP*, tetapi ianya tidak boleh dikatakan bahawa beliau tidak menimbang pembelaan perayu dan telah mendapati bahawa pihak pendakwaan telah membuktikan kesnya melampui keraguan munasabah.

Case(s) referred to:
Chin Choy v. PP [1955] 1 LNS 17 HC ***(refd)***
Datuk Hj Wasli Mohd Said v. PP & Another Case [2006] 6 CLJ 1 HC ***(refd)***
Lee Ah Cheong v. Regina [1958] 1 LNS 30 HC ***(refd)***
Mat v. PP [1963] 1 LNS 82 HC ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
Shaafie Saibi v. PP [2009] 3 CLJ 364 CA ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 163, 164, 165(1), 166, 170(1)
Arms Act 1960, s. 8(a)
Firearms (Increased Penalties) Act 1971, ss. 3, 8

For the appellant - Burhanudeen Abdul Wahid; M/s Burhan & Co
For the respondent - Samihah Rhazali DPP; AG's Chambers

[Appeal from High Court, Kota Bahru; Criminal Trial No: 45-4-2006, 45-5-2006, 45-7-2006 & 45-1-2007]

Reported by Kumitha Abdul Majid

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JUDGMENT

Clement Skinner JCA:

[1] This is an appeal by Ibrahim bin Amat ("the appellant"). The appellant was charged at the High Court Kota Bharu, with the following offences:

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(a) In case No. 45-4-2006:

One charge under s. 3 Firearms (Increased Penalties) Act 1971 of having discharged a firearm in the commission of an offence. After a full trial the appellant was convicted and sentenced to punishment of death;

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(b) In case No. 45-5-2006:

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A joint charge with Mohd Razali bin Mohamad under s. 8 Firearms (Increased Penalties) Act 1971 of being in unlawful possession of a firearm (home-made pistol). On pleading guilty to the charge at the close of the prosecution case he was sentenced to ten years imprisonment from date of arrest (17 August 2004) and six strokes of whipping;

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(c) In case No. 45-7-2006 the appellant faced two charges:

(i) a 1st amended charge under s. 8 Firearms (Increased Penalties) Act 1971 of being in unlawful possession of a firearm (a Smith & Wesson revolver). On pleading guilty to the charge at the close of the prosecution case he was sentenced to ten years imprisonment from 17 August 2004 and six strokes of whipping;

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(ii) the 2nd charge was under s. 8(a) Arms Act 1960 of being in possession of various types of bullets without a licence. On pleading guilty to the charge at the close of the prosecution's case he was sentenced to four years imprisonment from 17 August 2004 such sentence to run concurrently with the sentence of imprisonment in the 1st charge;

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(d) In case No. 45-1-2007"

One charge under s. 8(a) Arms Act 1960 with being in possession of 12 bore bullet. On pleading guilty he was sentenced to four years imprisonment from 17 August 2004 the sentence to run concurrently with the other imprisonment terms.

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[2] When the trial commenced, the prosecution applied for all the charges to be jointly tried. Counsel for the appellant and the other accused did not object. The learned judge allowed the application.

[3] As indicated earlier, at the close of the prosecution case the appellant pleaded guilty to all the charges except the charge in case No. 45-4-2006 under s. 3 Firearms (Increased Penalties) Act 1995. However the punishment in respect of the charges the appellant had pleaded guilty to were only imposed on him after the trial of case No. 45-4-2006 had ended.

[4] The appellant now appeals against his conviction and sentence in Case No. 45-4-2006, as well as the sentences imposed on him in the other cases.

The Brief Facts

[5] On 17 August 2004 at about 5am when Haji Mohamad Napi bin Omar (SP3) and his family returned home to their house at Kg Telosan, Pasir Puteh, Kelantan from a trip to Kuala Lumpur, they found the appellant there with his car. The co-accused Mohd Razali bin Mohamad was also there. The appellant informed SP3 that he had gone to the latter's house to "tumpang tidur". After breakfast the appellant called SP3 and showed him a revolver which the appellant produced from his trousers and put the gun on the table. The revolver (exh. P13A) was also seen by SP3's wife ie, Che Kasman Bt Mat Ariffin (SP4) and his adopted son Mohd Adnan bin Ahmad Fauzi (SP5) who were present in the house. Later SP3 and SP5 took the appellant to a place where there was "coverage" to enable the appellant to use his handphone. On returning home SP3 and SP5 left their house with the permission of the appellant who remained there. By then SP4 had already left the house to go to her father's house nearby.

[6] On receiving information about the appellant's presence at SP3's house, a police party led by ASP Mohamad Hatta bin Che Din (SP6) rushed there in two vehicles. On arrival there the police party found the appellant and the co-accused sitting in their car with its engine running. The appellant was seated in the driver's seat. While still in his car which was about 12 to 13 feet away from the appellant's car, SP6 shouted "Police, Police, Police" through his front side window which was wound down, in the

direction of the appellant's car. At the same time Det L/Kpl Bakri (SP8) who was in the same car as SP6 got out to approach the appellant's car, holding a gun. It is SP6's evidence that he saw the appellant pointing a revolver and firing a shot in the direction of SP8 but the shot apparently missed its mark. SP6 and his men then returned fire. The appellant (who was injured) was then seen coming out of his car and throwing a waist pouch (exh. P10A) onto the ground. The co-accused also got out of the car and both were arrested.

[7] After the shoot-out the police recovered the following items at the scene of incident:

(i) The waist pouch (exh. P10A) thrown away by the appellant containing six bullets (exh. P15A-F)

(ii) A homemade pistol (exh. P39) found in the front part of the car driven by appellant which was loaded with one 12 bore bullet (exh. P48)

(iii) A revolver bearing serial No. 363315 (exh. 13A) in the chamber of which was found four live bullets and 1 spent shell.

[8] The Armourer at Police Headquarters Kelantan ASP Ismail bin Othman (SP2) confirmed from test conducted by him that the home-made pistol and the revolver were serviceable. The Chemist Puan Zainun bt Muhamed (SP1) confirmed that the bullets abovementioned were 'live'.

[9] Based on the evidence outlined above the learned trial judge found that at *prima facie* case had been established against the appellant on the charge under s. 3 of the Firearms (Increased Penalties) Act 1971 in case no. 45-4-2006 in that:

(a) the appellant had tried to avoid arrest by the police;

(b) the appellant had fired a shot and the Chemist's evidence confirms that the spent shell exh. P14A was fired from the revolver exh. P13A;

(c) the shot was fired with the intention to injure someone;

(d) the revolver was serviceable.

[10] On being called to enter on his defence the appellant gave evidence on oath. In essence the appellant's defence was that he is a Thai national who had gone to SP3's house to rest and get some sleep as SP3 was his former employer. He said he informed SP3 that he was no longer working as a tractor driver as he was now acting as a 'source' for the police to catch those involved in selling guns and drugs. According to the appellant, he had shown SP3 the gun he (appellant) was carrying because SP3 had asked him whether he had a gun.

[11] With regard to the shoot-out with the police, the appellant said that after SP3 and SP5 left the house (after returning from the area where he could use his handphone) he remained in the house. Shortly after he saw a car with his enemies ('musuh') approaching the house. There were four people in the car which had its windows wound down. The occupants of the car, who he did not know, were giving him strange looks. Appellant said he then noticed a second car, also with its windows wound down, followed by a third car, so the appellant told the co-accused to get into their car so that they could leave the place. But the appellant mistakenly drove into the compound of a neighbouring house so he had to reverse back. According to the appellant he then saw six persons with drawn guns approaching him. On seeing this the appellant said he "kelam kabut". He heard an explosion from the direction in front. During the chaos the appellant said he pulled out his pistol but he was not aware whether he fired the pistol or not. The appellant further said that before the shooting the police did not identify themselves as policeman nor did they use a loud hailer. According to the appellant his car radio was switched on at that time. The appellant also said that the approaching persons did not warn him that they were police. They were all dressed in civilian clothes. The appellant said he "kelam kabut" as he thought the persons in the car were his enemies as his "information" to the police had resulted in the arrest of a few persons.

[12] At the conclusion of the case the learned judge found the prosecution had proved its case beyond a reasonable doubt against the appellant and that the appellant had failed to contradict the prosecution case.

A **The Appeal**

[13] In bringing this appeal the appellant has raised the following grounds:

(a) Wrongful misjoinder of charges.

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(i) It is the appellant's case that in all, six charges were preferred against in these cases, in that, he was charged with [1] discharging a firearm (.38 Smiths & Wesson) in the course of committing a scheduled offence, [2] possession of that firearm, [3] possession of the bullets in the said firearm, [4] joint possession of a home-made firearm, [5] joint possession of a bullet in the home made firearm and [6] possession of bullets found in the waist-pouch thrown out from the car.

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(ii) The appellant complains that whereas s. 165(1) of the Criminal Procedure Code (CPC) permits a person to be charged with and tried for more offences than one if those offences were committed "in one series of acts so connected together as to form the same transaction", the appellant contends that the learned judge was wrong to have allowed a joint trial in respect of the six offences he was charged with here as they all cannot be said to be a series of acts so connected together as to form the same transaction.

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(iii) While the appellant concedes that it was permissible to hold a joint trial in respect of three of the charges ie, [1] discharging a firearm [2] possession of that firearm and [3] possession of the bullets in that firearm, as the criteria mentioned in s. 165(1) was met, he contends that it was not permissible for the other three charges to be jointly tried with the first three as well. The appellant contends that the improper joinder of these trials has resulted in an illegality which cannot be cured (see *Chin Choy v. PP* [1955] 1 LNS 17). Learned counsel for the appellant took a further point. He said that as a rule of practice a capital charge should not, generally speaking, be coupled with non-capital charges in the same indictment, the reason being that when an accused person is defending himself on

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a capital charge, he ought not, in fairness, to be required to defend himself on other additional charges at the same trial (see *Lee Ah Cheong v. Regina* [1958] 1 LNS 30; [1958] 24 MLJ 242 at p. 244).

(iv) Having carefully considered the submissions of the appellant, we do not agree with them. A reading of ss. 163, 164, 165, 166 and 170 CPC shows that generally speaking whilst there should be a separate trial for every distinct offence with which a person is charged, it is not a must. The court is given a discretion whether to allow a joint trial of more than one offence if the conditions mentioned in the aforementioned sections are met. It needs to be mentioned however that there is case law to the effect that even if the conditions mentioned in the aforementioned sections are met for a joint trial of offences, the court still has a discretion not to order a joinder of trials because ss. 164, 165, 166 and 170 all use the words "he may be" and not that "he must be" jointly tried where the conditions mentioned in the sections are met. (see *Shaafie Saibi v. PP* [2009] 3 CLJ 364).

(v) Reverting to the facts here, the question that arises for consideration is whether the acts constituting the other three offences were a series of acts so connected together with the acts constituting the first three offences so as to form the same transaction? If so, then there was no improper exercise of discretion to allow a joinder of trials. In our judgment there was no improper joinder for the following reasons. It is primarily a question of fact whether the other three offences are so closely connected to the first three offences so as to form the same transaction. In deciding whether the acts constituting the other three offences had such a character the court will look to see if the following features are present, namely, (a) proximity of time, (b) unity or proximity of place, (c) continuity of action and (d) unity of purpose or decision (see *Datuk Hj Wasli Mohd Said v. PP & Another Case* [2006] 6 CLJ 1 at p. 21).

(vi) We find the other three offences meet all the above criteria in that immediately after the shoot-out between the police and the appellant at Kg. Telosan, the home-made firearm with the bullet in it was found in the car driven by the appellant. Likewise, the waist pouch in which the bullets were found was thrown to the ground by the appellant on his coming out of the car to surrender to the police after the shoot-out. We are satisfied that these acts and facts which constitute the other three charges did not just occur by themselves independent of each other and at different places and dates or times but were in fact part and parcel of the earlier act of the appellant in getting into his car to try to get away from PW3's house upon seeing the two or three cars arrive there and in discharging or firing the Smith & Wesson pistol at the police while still in the car. The series of acts were so closely connected together that they formed the same transaction.

(vii) Learned counsel for the appellant took another point. He contended that since s. 165 states that if more offences than one are "committed by the same person, he may be charged with and tried at one trial for every such offence," the appellant should have not been tried together with the co-accused, since according to counsel, from the words highlighted above the section refers only to one person who may be charged. We find no merit in this contention. Section 170(1) CPC clearly gives the court a discretion to allow persons to be charged and tried together or separately as the court thinks fit when more persons than one are accused of the same or of different offences committed in the same transaction, which was the case here.

(viii) With regard to the rule of practice that a capital charge should not be coupled with a non-capital charge, we find that even though the practice was not followed in this case, it has not been pointed out to us how the appellant was prejudiced by it or how a failure of justice has been occasioned by not giving effect to that rule of practice.

(ix) We accordingly find that there was no wrongful joinder of trials in this case as alleged.

(b) No case made out against the appellant of discharging a firearm in the course of committing a scheduled offence ie, relating to the charge in case 45-4-2006.

In support of this ground the appellant raised two contentions.

(i) Under s. 3 of the Act, it is an offence only if a person, at the time of his committing a scheduled offence, discharges a firearm with intent to cause death. The prosecution's case is that the appellant was resisting arrest when he discharged his firearm, but according to the appellant there is no evidence or there is considerable doubt whether the appellant was resisting his own arrest at the material time because SP6 ie, ASP Mohamed Hatta bin Che Din who led the police partly said in evidence that when he shouted "Police" 3 times in the direction of the appellant's car, he had done so "untuk buat pemeriksaan". Counsel for the appellant contended that there is every possibility that the appellant may not have heard SP6's shouts since the appellant's car engine was running and the music in the car was on. Further, since SP6 and his men were in unmarked vehicles and not in uniform, the appellant would not know SP6 was a police officer. The appellant accordingly contended that the prosecution's evidence admits of two inferences ie, the appellant could or could not have heard the shouts of SP6. So applying the principle in the case of *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457 at p. 465, the inference in favour of the appellant must be drawn, with the result that there is no evidence that the appellant was resisting his own arrest.

(ii) We do not agree. Before the inference which the appellant wishes the court to draw may be made, the appellant must first lay down the necessary evidentiary basis before he can invite the court to draw such an inference. The appellant must at least say in his evidence that he did not hear the shouts of "Police" because his car engine was running and music was playing loudly in the car. It is only when the appellant asserts so that the court will be entitled to consider whether it is probable that the appellant may or may not have heard the shouts of

A "Police" because of the noise of the car engine and music and then draw the necessary inferences. The evidence shows that the appellant never said in his evidence in chief when making his defence that PW6 had shouted something to him but he could not hear what was said for the
B reasons given by him. What the appellant said on the matter in answer to some leading questions was:

Q. Sebelum musuh menembak adakah mereka kata mereka Polis?

C A. Tidak. Mereka juga tiada pembesar suara.

Q. Mereka tidak beri amaran polis?

A. Tidak. Di samping itu radio kereta saya dipasang.

D Q. Orang yang keluar dari kereta itu, ada pakai uniform polis?

A. Tidak. Mereka berpakaian biasa.

Q. Kenapa kamu kelam kabut dan takut bila musuh datang?

E A. Saya dalam keadaan beringat 24 jam. Saya beringat dengan musuh. Ini kerana saya "source" polis dan ada yang ditangkap hasil dari source yang saya beri.

Q. Pada 17.08.04 ada orang yang hendak perkenakan pada
F kamu?

A. Ya.

Q. Jika 2-3 kereta datang, mereka kata Polis, kamu akan berhenti?

G A. Jika dengan polis saya akan berhenti kerana saya tidak takut polis.

(iii) So the above evidence shows that appellant in effect denies that SP6 shouted "Police" 3 times and not that he did not
H hear what SP6 said as his radio was on as now sought to be made out during the appeal. Further, even though the appellant said the radio was on he did not say music was playing or how loudly the radio was playing. In our judgment there is no evidential basis to support the
I inference the appellant seeks to draw.

(iv) With regard to the appellant's contention that there was no evidence to show that he was resisting arrest, we do not agree. Although the police did not get a chance to actually lay their hands on the appellant so as to arrest him before the shoot-out, this does not mean the appellant was not resisting arrest when he discharged his firearm - whether the appellant was resisting arrest when he fired the gun is a matter to be inferred from the conduct of the appellant in the prevailing circumstances at the material time.

(v) Even though the appellant denies he knew that the people in the two or three cars that came to the kampong were policemen, we find that it is more probable than not that he must have known so and heard SP6's shouts as SP6 had said he had shouted "Police" 3 times from a distance of only 12-13 meters away and the side windows of his car and the appellants car were wound down. The appellant's conduct of driving his car into the compound of a neighboring house and reversing is consistent with his knowing that it was policemen in the two or three cars which arrived at SP3's house and that he had heard SP6 shouting "Police", and knowing that he was not in lawful possession of the firearms and the ammunition found with him, he had tried to get-away and had discharged his firearm to resist his own arrest. The appellant's explanation for his leaving ie, he thought the persons in the three cars were his enemies as he was a police "source" lacks credibility. In his evidence-in-chief the appellant in effect admitted that he did not know who the people in the cars were. So on what basis did the appellant say they were his enemies? In our view there was none as there is absolutely no evidence that he had informed anyone that he was at Kg Telosan at the material time. The appellant did receive a telephone call from his wife but there is no evidence that he informed her where he was. Neither is there any evidence led by the defence that the others in Haji Mohamad Napis's (SP3's) house had informed anyone else including those who might be considered as "musuh", about the appellant's whereabouts on the day in question. Neither is there any evidence that apart from people at the

A "IPK" mentioned by the appellant, anyone else knew he was a "source" for the police. Accordingly, the appellant's story that he was trying to make a get-away as he thought the persons in the three cars were his "musuh" is inherently improbable.

B

(vi) The second contention raised by the appellant was that he did not discharge the firearms in the direction of SP8 but the gun was discharged inside the car when the pistol got stuck. Therefore according to the appellant, it could not be C said that he had discharged the firearm with intent to cause death as required by s. 3 of the Act. In support of his contention, appellant's counsel referred to the concession made by SP6 in cross-examination that it is possible that the pistol "jika tersangkut, mungkin ia boleh D meletup," and also to the fact that the bullet allegedly fired in the direction of SP8 was never produced in court, which is contended, strengthens the appellant's contention that the pistol was fired in the car when it (pistol) got stuck.

E

(vii) We find no merit in this contention. While SP6 was candid enough to admit that it is possible for the firearm to be discharged when it got stuck, it is not probable that that happened in this case as there is the direct eye witness F account of SP6 and SP8 that they saw the appellant point the pistol in the direction of SP8 and fire the gun. It has not been shown that SP6 and SP8 were not credible witnesses or that their account of the events are not worthy of belief. Their version of events is to be G contrasted with that of the appellant. In his evidence-in-chief the appellant was asked what happened after he saw the six people holding guns coming towards him. He was asked (at p. 384 record of appeal):

Q. Selepas itu?

H

A. Saya kelam kabut. Saya dengar bunyi meletup dari arah depan. Jadi bila kelam kabut, saya cabut pistol dan saya tidak sedar sama ada menembak. Saya nampak tembakan kemudian berhenti. Saya tengok tangan kanan saya cedera di 4 tempat dan tangan kiri satu tempat cedera.

I

Q. Kamu tahu sama ada letupan dari pistol kamu? A

A. Tidak sedar.

(viii) The above answers show that the appellant was not aware of whether he fired his pistol or not. He never said that the pistol got stuck in the car or that he discharged B the pistol while it was stuck in the car.

(ix) In his cross-examination by the learned DPP (at p. 430 record of appeal) the appellant said:

C

Q. Dalam keterangan kamu, kamu kata pistol tertembak bila polis mari?

A. Saya nampak orang penjahat di depan. Mula-mula saya bersembunyi. Saya tidak dapat lari dan saya dengar meletup mereka tembak ke arah saya. Bila bunyi letupan D saya tidak sedar.

Q. Cadangan – polis kata polis, jangan lari?

A. Saya tidak sedar.

E

Q. Cadangan – dalam chamber P13A ada 1 kelongsong yang 1 tembakan dilepaskan?

A. Saya tidak tahu. Selepas letupan polis rampas pistol.

(x) These answers again show that the appellant never said he F discharged the pistol in the car while it was stuck. Accordingly the appellants attempt to show that he fired his pistol while it was stuck in the car and not at PW8 is not supported by the evidence. And even though the bullet fired by the appellant was never produced in court, G there is the eye witness account of SP6 and SP8 regarding the discharge by the appellant of the gun in SP8's direction. The irresistible inference of such act is that the appellant intended thereby to cause death while resisting arrest.

H

(c) Flawed appreciation of evidence by learned judge.

(i) The final ground of the appellant was that the appreciation of evidence by the learned judge was flawed because at p. 552 of his judgment the learned judge said "SP6 I memperkenalkan dirinya sebagai polis dan mengarahkan

tertuduh dan kawannya keluar. Mereka enggan". According to the appellant this finding is wholly fallacious as there is no evidence on the face of the record to support what the learned judge said. The appellant complains that this is a crucial error since it will determine if the subsequent alleged conduct of the appellant amounts to committing a scheduled offence.

(ii) We find no merit in this contention. While it is true that SP6 did not say, what the learned judge attributed to him, we do not find it fatal to the prosecution case because there is other evidence to show that the appellant knew that it was the police who arrived in those cars. There is the evidence of SP8 who said that he got out of the car and went towards the car driven by the appellant. SP8 said: "Saya mengeluarkan kata "Polis, Polis, keluar"." (see p. 189 record of appeal). So the error was in the learned judge failing to correctly identify which witness asked the appellant to get out of the car. The error is not a serious one as the evidence referred to by the learned judge did exist, he only got it wrong as to who asked the appellant to get out of his car. This is not a case where the learned judge had relied on non-existent evidence to come to a finding that the appellant refused to get out of the car and tried to resist arrest.

(iii) It was finally said that the learned judge had not applied the time honoured test stated in *Mat v. PP* [1963] 1 LNS 82 in evaluating the evidence of the appellant. We do not agree. The learned judge may not have recited the text stated in *Mat v. PP*, but it cannot be said that he did not consider the defence of the appellant. He clearly did and came to the finding that it had not raised a reasonable doubt on the prosecution case which the judge said he found proved beyond a reasonable doubt.

[14] It was for all the above reasons that we dismissed the appellant's appeal and affirmed the conviction and sentence passed on the appellant by the High Court.